OGC 64-5052

CONFIDENTIAL

10 November 1964

MEMORANDUM FOR: The Legislative Counsel

SUBJECT: Proposed Revision of the U.S. Copyright Laws - S. 3008

1. Reference is made to the letter dated 31 August 1964 to the General Counsel from Abraham L. Kaminstein, Register of Copyrights, requesting CIA comments by 15 November on the proposed revisions of the copyright law contained in S. 3008 and companion bills, and your request for my comments, dated 1 September 1964.

2. I have reviewed this proposed legislation. It makes an attempt to modernize the basic American act of 1909, as amended, by a completely new law, but seemingly contains no general repealer section. It attempts to resolve or eliminate some of the more controversial problems which have been the subject of much discussion during the drafting period of the past few years. In particular, earlier proposals have been eliminated which would have tried to give some legislative authorization to limited reproduction of copyrighted material (by libraries in particular) through the use of reprography such as Xerox and similar machines. It is my understanding that the book publishers organizations felt that any such legislation would be too liberal, and library and educational groups felt it would be too restrictive, so the Copyright Office took the easy way out and eliminated any specific language except for some fudging under the doctrine of fair use in Section 6.

3. Section 1 lists the subject matter of copyright which subsists "in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."

4. Section 2 provides that the subject matter of copyright includes "derivative works". The term "derivate work" is defined to include translations in Section 54. Translations have always been subject to copyright protection; S. 3008 does not alter CIA's continuing

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problem when we find it necessary to translate copyrighted material

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5. The General Counsel of the Copyright Office advises me that S. 3008 will not authorize copyright in mechanical translations, and that there would be no legal basis for such authorization. It is their contention that mechanical translation is not an "original work of authorship", and in fact lacks both authorship and creativity. I have long felt that the problem of mechanical translation presents serious copyright difficulties, particularly as regards authorship of the translation. I feel that some careful provision should be attempted in this regard, and the Register of Copyright and the appropriate committees should be informed of our views. If you agree, I will try to draft something after consultation with New York attorneys.

6. Section 3 of S. 3008 provides for the protection of works published abroad and, in some respects, is similar to the protection offered by the present law. I mention the section only to note that a work is subject to copyright if first published in a foreign nation that is a party to the Universal Copyright Convention of 1952, and this could cause CIA some problems if the USSR ever became an adherent to the Convention. There is nothing new on that situation at the moment. One new provision in this section authorizes copyright protection for works first published by the UN or agencies thereof and the OAS.

7. Section 4 provides a new approach to copyright protection for government publications. This section restates the basic rule that copyright is not available for U. S. Government publications; but it is provided that in "exceptional cases" copyright may be secured for a Government publication if it is determined that, because of its special nature or the circumstances of its preparation, copyright protection would result in more effective dissemination or "for other reasons would be in the public interest." The basic purpose for this exception is largely one of dissemination of scientific and technical works, because some agencies feel that the publication of such works by the Government Printing Office or a government agency often does not reach the desired market. It is argued that if the Government could have a technical work published by a reputable publisher in such fields, (such as McGraw-Hill), it would reach a much wider technical audience than if it were published by the Government Printing Office. In such a case, the Government

would be entitled to secure copyright, and the publisher could publish without fear that a rival concern could rapidly publish a cheaper edition without infringement. The head of the Government agency for which the work is prepared shall determine each case in which a copyright is desired and publish the basis for his decision. This determination shall be reached in accordance with regulations "established by an administrative officer designated by the President." The Copyright Office is expecting a headache over this one, in part recalling the lawsuit raised in the case of Admiral Rickover. More potent, newspaper organizations have already indicated their complete opposition to any Government copyright, even if the section specifically authorizes newspaper use. A "work of the U.S. Government" for the purpose of this section is defined as a work prepared by an officer or employee of the Government as part of his official duties. The Copyright Office advises that material prepared under contractual arrangement with the Government does not fall within this definition. However, once a contractor secures copyright pursuant to contractual arrangement, such a copyright may be assigned to the Government.

8. Section 6 of S. 3008 is a new section and attempts to give a statutory basis for the judicial doctrine of fair use. It appears to be a much more workable and useful section than the fair use section of the British copyright law of 1956. S. 3008 provides for the "fair use of a copyrighted work to the extent reasonably necessary or incidental to a legitimate purpose such as criticism, comment, news reporting, teaching, scholarship, or research ..." and that such use is not an infringement. Section 6 then provides certain factors to be considered, including the purpose and character of the use, the amount used in relation to the whole, and the effect of the use on the potential market or value of the copyrighted work. In providing for such use "to the extent reasonably necessary", and in setting forth the factors of measurement , the proposed revision throws the whole matter back to judicial determination; of course the statute cannot set up strong guidelines such as the number of words or pages used. It is under this section that the Copyright Office foresees the authorization for library reproduction for scholarly purposes such as "teaching, scholarship or research." Here again CIA has an interest. In furthering scholarship or research, the Copyright Office draft has in mind the scholar who comes to a library and asks for a Xerox copy of a few pages or even an

article from a periodical. It does not contemplate a teacher getting multiple copies of a copyrighted article or a major section of a book for distribution to his class without permission of the copyright owner, and, if necessary, a royalty payment. Section 6 therefore does not improve the position of the Office of Training when OTR makes multiple copies without permission of the copyright owner. To be technical about it, when Paul Chrétien distributes copies of a copyrighted article from a periodical in his daily clippings, he is infringing the copyright, and this new section will not change that position. In the drafting of this section, and with the new machines of reprography in mind, various things have been considered, such as an ASCAP for authors, but these have all fallen by the wayside. As a matter of fact, I have had grave doubts personally as to whether the unauthorized reproduction of a whole article from a magazine by means of reprography can properly be considered "fair use", either under judicial determination or, as now proposed, by statute.

9. Section 19 of the proposed revision preempts for the Federal statutes all rights in the nature of copyrights, published or unpublished, and abrogates such rights in the common law or state statutes.

10. A major change is made in the duration of copyright protection which now stands at 28 years with a similar renewal period. Under Section 20 of the proposed revision, copyright in a work created after 1 January 1967 subsists from its creation and endures for the life of the author plus 50 years (to the end of the calendar year of the 50th year). Special provisions are included for works existing as of 1 January 1957. This new term puts the U.S. on the same basis as most countries, including those adhering to the Universal Copyright Convention. 25X1

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Walter Pforzheimer
Curator
Historical Intelligence Collection
CIA Library

12 November 1964